IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0041

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TIMOTHY G. WALTER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court, Missoula County,
The Honorable John W. Larson, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Should this Court exercise its sparingly-used plain error review to a constitutional claim that Walter raises for the first time on appeal?

2. If this Court exercises plain error review, did the State violate Walter's Sixth Amendment Right to Confrontation when it introduced Walter's driving record?

STATEMENT OF THE CASE

A jury convicted Timothy G. Walter (Walter) of failing to wear a seatbelt and driving while suspended. (D.C. Doc. 15.) The district court sentenced Walter with a fine and 6 months in jail, with all but 2 days suspended. (D.C. Doc. 17 at 2.) Walter now raises a constitutional challenge for the first time on appeal.

STATEMENT OF THE FACTS

In June 2009, Montana Highway Patrol Trooper Sean Finley stopped Walter for a turn-signal violation. (11/30/09 Tr. [hereinafter Tr.] at 95-96.) Trooper Finley observed that Walter was not wearing his seatbelt. Id. Trooper Finley called in Walter's driver's license and learned that Walter's license was suspended. Id. at 96-97. Walter did not act surprised when the trooper informed him that his license was suspended. Id. at 99. Trooper Finley arrested Walter for driving while suspended. Id. at 98.

A Missoula County Justice Court jury convicted Walter of driving without a seatbelt and driving while suspended. (Verdicts, attached to D.C. Doc. 1.) Walter appealed to the district court, and he received a second jury trial. (D.C. Docs. 1, 12.)

During the district court trial, the State introduced an "Order of Suspension," which showed that Walter's driver's license had been suspended on January 12, 2009. (State's Ex. 2; Tr. at 115.) The prosecutor referred to this order as a "self-authenticating certified copy or portion of the copy of Mr. Walter's driving record," which established that Walter's license was suspended. (Tr. at 115.) Walter objected to the admission of the order, but did not state any rationale for his objection. Id.

The Order of Suspension is a letter from the motor vehicle division and it is addressed to Walter. (State's Ex. 2.) In addition to notifying Walter that his driver's license was suspended, the letter provided information about reinstating his license and where he could obtain further information regarding his driver's license suspension. (State's Ex. 2.)

The State also introduced documents showing that the State had sent prior notices to Walter informing him that he owed money for fines and that his driver's license would be suspended if he did not pay the fines. (State's Exs. 4 and 5.) The addresses listed on the notices from the State matched the address on his driver's license. (State's Exs. 2 and 4; Tr. at 128.) Walter also admitted on the stand that

his driver's license was suspended when Trooper Finley stopped him. (Tr. at 129.) The justice court clerk testified regarding the documents and notices involved in the license suspension process. (Tr. at 132-42.)

The jury convicted Walter of failing to wear a seat belt and driving while suspended. (D.C. Doc. 15.)

SUMMARY OF THE ARGUMENT

Walter failed to preserve a Sixth Amendment challenge to the Order of Suspension because he failed to raise any constitutional objection in the district court. Additionally, Walter has failed to demonstrate a manifest injustice that would warrant this Court's exercise of its discretionary plain error review. Thus, this Court should refuse to consider Walter's constitutional claims.

Moreover, the admission of the suspension letter did not trigger Walter's Sixth Amendment confrontation right because the letter does not constitute a testimonial statement. This Court should affirm.

STANDARD OF REVIEW

This Court does not exercise plain error review unless "failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or

may compromise the integrity of the judicial process." State v. Davis, 2003 MT 341, ¶ 19, 318 Mont. 459, 81 P.3d 484. This Court exercises de novo review to constitutional questions. State v. Sanchez, 2008 MT 27, ¶ 15, 341 Mont. 240, 177 P.3d 444.

ARGUMENT

I. THIS COURT SHOULD REFUSE TO CONSIDER WALTER'S CONFRONTATION CLAUSE CHALLENGE BECAUSE HE WAIVED ANY CONSTITUTIONAL CLAIM IN THE DISTRICT COURT AND BECAUSE PLAIN ERROR REVIEW IS INAPPROPRIATE.

A. Walter Waived His Confrontation Clause Challenge to the Order of Suspension by Failing to Raise a Constitutional Objection in the District Court.

The general rule is that a defendant's failure to raise an objection in the trial court amounts to a waiver of the objection for appellate review. Mont. Code Ann. § 46-20-104. This Court consistently refuses to consider theories, arguments, or issues raised for the first time on appeal. State v. LaFreniere, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161. This Court recognizes that it is "fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider." LaFreniere, ¶ 11 (citations omitted). Accordingly, objections must be specific; general objections will not preserve an issue for appeal. LaFreniere, ¶ 12. Moreover, this Court "avoids constitutional issues whenever

possible" and has stated that it "is axiomatic that we will not review an argument, much less a constitutional challenge, that is raised for the first time on appeal." State v. Normandy, 2008 MT 437, ¶¶ 18-19, 347 Mont. 505, 198 P.3d 834.

In the district court, Walter failed to raise a constitutional objection to the admission of State's Exhibit 2 (Tr. at 115), and thus, this Court should refuse to consider his argument. LaFreniere, ¶ 12. Though Walter generally objected to the exhibit, he offered no rationale for his objection, stating only, "Objection, Your Honor." (Tr. at 115.) Now, on appeal, Walter argues for the first time that the admission of State's Exhibit 2, the Order of Suspension, violated his Sixth Amendment right to confrontation.

In addition to preserving issues for appeal, the purpose of objections is to grant trial courts the opportunity to correct errors in a proceeding. In re M.W., 2002 MT 126, ¶ 23, 310 Mont. 103, 49 P.3d 31. Entertaining Walter's constitutional challenge based on a general objection would defeat the purpose of the contemporaneous objection rule and encourage parties to make unspecific or groundless objections in the trial courts. Walter lodged no constitutional objections in the district court, and thus, his constitutional argument is not properly before this Court.

B. This Court Should Decline Plain Error Review Because Walter Has Failed to Satisfy the Threshold Requirements.

Walter asserts that this Court should employ its discretionary plain error review if it determines that he did not properly preserve his constitutional

challenge. (Appellant's Br. at 15.) Walter does not claim that he qualifies for plain error review under the plain error statute, Mont. Code Ann. § 46-20-701. Rather, Walter urges this Court to apply its inherent plain error review.

The common law plain error doctrine "allows this Court to discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights," even absent a contemporaneous objection and notwithstanding the inapplicability of the plain error statute. Davis, ¶ 19. The plain error doctrine only applies, however, if "failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." Davis, ¶ 19. Thus, a party arguing for plain error review must make a threshold showing that the claimed error would satisfy these criteria. State v. West, 2008 MT 338, ¶ 23, 346 Mont. 244, 194 P.3d 683.

Walter has failed to make the threshold showing that plain error review is necessary to avoid a manifest miscarriage of justice, or leave unsettled the question of the trial's fundamental fairness, or compromise the integrity of the judicial process. Davis, ¶ 19; West, ¶ 23. Though Walter argues at length that his case is analogous to the United States Supreme Court's decision in Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), he offers little more than his assertion that failure to review his claim will result in a manifest miscarriage of justice and

violate his constitutional rights. Thus, Walter has failed to satisfy the threshold requirements for this Court to invoke its extraordinary plain error review.

Moreover, this Court repeatedly has emphasized that plain error review is used "sparingly" and only in "exceptional" cases. E.g., State v. Baker, 2000 MT 307, ¶ 13, 302 Mont. 408, 15 P.3d 379. Walter's primary argument for plain error review is that the "relevant Supreme Court case law had been decided prior to his trial." (Appellant's Br. at 11; also Appellant's Br. at 16.) While the existence of relevant case law may provide grounds to raise a trial objection in the first instance, it is insufficient to warrant plain error review. Adopting Walter's view that the existence of relevant case law could trigger plain error review would eviscerate the rationale underlying plain error review. Under Walter's theory, counsel would have no reason to raise any constitutional objections at the trial court level; counsel could simply await the result of a decision and then research and raise any issues for the first time on appeal.

Further, Melendez-Diaz is consistent with Montana law and, therefore, would not be grounds for plain error review even under Walter's theory. In Melendez-Diaz, the United States Supreme Court held that defendants are entitled to confront forensic analysts who provide affidavits stating that a substance is a narcotic. Melendez-Diaz, 129 S. Ct. at 2532. This has been the rule under the Montana Constitution for more than 12 years. See State v. Clark, 1998 MT 221, ¶¶ 24-25, 290 Mont. 479, 964 P.2d

766 (holding that Mont. Const. art. II, § 24, entitles defendants to confront and cross-examine forensic analysts who report the chemical analysis of drug testing), see also Melendez-Diaz, 129 S. Ct. at 2554 (Kennedy, J., dissenting) (noting that, prior to the majority's decision, Montana was one of only two states that required confrontation.) Melendez-Diaz does not announce a new rule in Montana, and thus, even under Walter's view, plain error review would be unwarranted.

In addition to devaluing the exceptional nature of plain error review, Walter's theory also conflicts with the United States Supreme Court's application of the Confrontation Clause. In Melendez-Diaz, the United States Supreme Court observed that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." Melendez-Diaz, 129 S. Ct. at 2534 n.3. Additionally, the Court stated that the "defendant *always* has the burden of raising his *Confrontation Clause* objection . . . ." Melendez-Diaz, 129 S. Ct. at 2541. Here, Walter raised no such objection. Walter's argument for plain error review shifts the burden of raising confrontation from defendants to the courts and clashes with Melendez-Diaz, the very case upon which he bases his primary argument.

Finally, no plain error exists in this case. A "fundamental aspect of 'plain error,' is that the alleged error must indeed be 'plain.'" State v. Upshaw, 2006 MT 341, ¶ 26, 335 Mont. 162, 153 P.3d 579 (citation omitted). The holding in

Melendez-Diaz does not address driving records. Thus, even if there were error, it would not be "plain" error. Of course, defendants are free to argue to trial courts that the Melendez-Diaz holding should extend to driving records, and, in fact, some defendants have made this argument. See, e.g., State v. Wood, 2010 Mont. Dist. LEXIS 17, ¶¶ 67-70 (Jan. 21, 2010). Like other defendants, if Walter believed that Melendez-Diaz should apply to him, he should have presented his argument to the trial judge. He did not, and thus, he waived any right to confrontation, which he is permitted to do. Melendez-Diaz, 129 S. Ct. at 2534 n.3. No "plain error" exists here, and this Court should again decline to review a legal theory that was not raised in the district court.

II. IF THIS COURT REVIEWS WALTER'S CLAIM, THE ADMISSION OF WALTER'S DRIVING RECORD DID NOT VIOLATE HIS RIGHT TO CONFRONTATION BECAUSE THE RECORDS ARE NOT TESTIMONIAL.

A. The Confrontation Clause Applies Only to Testimonial Statements.

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to be confronted with the witnesses against them. The Sixth Amendment's Confrontation Clause prohibits the admission of "testimonial" hearsay statements unless the declarant is unavailable for trial and the defendant had a prior opportunity to cross-examine the declarant. Crawford v. Washington,

541 U.S. 36, 68 (2004). The Confrontation Clause applies only to testimonial hearsay. Davis v. Washington, 547 U.S. 813, 821, 823-24 (2006); In re T.J.B., 2010 MT 116, ¶ 18, 356 Mont. 342, ___ P.3d ___.

In Melendez-Diaz, the United States Supreme Court held that affidavits reporting the results of a state drug lab's forensic analysis constituted "testimonial" statements, and thus, the analysts were "witnesses" for purposes of the defendant's Sixth Amendment confrontation right. Melendez-Diaz, 129 S. Ct. at 2532. In Melendez-Diaz, during a narcotics trial, the prosecution introduced several bags along with "certificates of analysis" from the state crime lab, which certified that the bags had been examined and contained cocaine. Melendez-Diaz, 129 S. Ct. at 2531. The United States Supreme Court held that the "certificates" were "quite plainly affidavits"; thus, the certificates fell within the "core class" of testimonial hearsay, and "[a]bsent a showing that the analysts were unavailable to testify *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." Melendez-Diaz, 129 S. Ct. at 2532.

Significantly, the Supreme Court refused to hold that every crime lab report implicates the Confrontation Clause. Melendez-Diaz, 129 S. Ct. at 2532 n.1. For example, the Supreme Court noted that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Melendez-Diaz, 129 S. Ct. at 2532 n.1. The Supreme Court noted a key distinction

between records that are kept in the ordinary course of business and those that are specifically produced for trial:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because--having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial--they are not testimonial.

Melendez-Diaz, 129 S. Ct. at 2539-40. The Supreme Court additionally characterized Melendez-Diaz as a "rather straightforward application of our holding in Crawford." Melendez-Diaz, 129 S. Ct. at 2533. Thus, under Melendez-Diaz, whether a statement or report implicates the Sixth Amendment continues to hinge on the nature of the statement or report and whether it is testimonial or nontestimonial.

B. Driving Records are Not Testimonial Statements.

The United States Supreme Court has not exhaustively defined the meaning of "testimonial," but it has articulated a "consistent starting point" for analysis:

> [The Confrontation Clause] applies to "witnesses" against the accused--in other words, those who "bear testimony." [1] N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Sanchez, ¶ 34 (quoting Crawford, 541 U.S. at 51.) When determining whether a statement is testimonial, the United States Supreme Court "finds significant the

statement's purpose, the statement's context, and the audience the statement is intended to reach." Sanchez, ¶ 34.

Melendez-Diaz does not address whether driving records are testimonial; however, the vast majority of jurisdictions to consider the issue have determined that driving records are not testimonial and do not implicate the Confrontation Clause. See Iowa v. Shipley, 757 N.W.2d 228, 236-238 (Iowa 2008) (holding that driving records are nontestimonial and citing cases); Maine v. Murphy, 991 A.2d 35, ¶¶ 19-26 (Me. 2010) (holding Secretary of State's certificate regarding notice of driver's license suspension not testimonial under Melendez-Diaz and setting forth reasons); Washington v. Kronich, 161 P.3d 982, ¶ 21 (Wash. 2007) (certified statement containing driver's license status was nontestimonial); Oregon v. Davis, 156 P.3d 93 (Or. App. 2007) (holding that printout of driving record was nontestimonial); Arizona v. King, 146 P.3d 1274, ¶ 25 (Ariz. App. 2006) (motor vehicle records nontestimonial).

In determining that driving records are nontestimonial, courts have found it significant that driving records constitute public records, that they are prepared separate from and prior to any criminal prosecution, and that they involve no expert analysis, but rather are created through routine data entry. For example, in Shipley, the Iowa Supreme Court determined that the defendant's driving record was nontestimonial and observed that the driving record was created "*prior* to the

events leading up to his criminal prosecution" and that his driving record would exist even if no criminal prosecution took place. Shipley, 757 N.W.2d at 237. The Iowa Court further reasoned that the "government functionaries" who entered the data in the driving record could not be "witnesses against him when no prosecution existed at the time of data entry." Shipley, 757 N.W.2d at 237.

Similarly, the Supreme Court of Maine recently held that the Secretary of State's certificate regarding a notice of driver's license suspension was not testimonial under Melendez-Diaz. Murphy, 991 A.2d 35, ¶¶ 19, 26. The Maine Court noted that, unlike the forensic certificates in Melendez-Diaz, the certificates in the driving-while-suspended case did not involve "expert analysis or opinion. Rather, they report neutral information by the public official charged with the custody of that information." Murphy, 991 A.2d 35, ¶ 21. The Maine Court further observed that the certificates were not primarily maintained or used for criminal prosecutions and that they were used in administrative proceedings and insurance-related matters. Murphy, 991 A.2d 35, ¶ 22.

Other jurisdictions also have emphasized the administrative nature of driving records and that they are created independently of a criminal prosecution. For example, the Oregon Court of Appeals noted that creating and maintaining driving records "is a ministerial duty having nothing to do with prosecuting a particular individual for criminal activity. . . . Indeed, the records are created before any

criminal act occurs." Davis, 156 P.3d at 96. An Arizona Court of Appeals similarly observed that motor vehicle records are statutorily required and "exist independently of any criminal prosecution." Arizona v. King, 146 P.3d 1274, ¶ 25 (Ariz. App. 2006). In determining that the records were not testimonial, the Arizona court noted that the "records merely document facts already established through the judicial process. Thus, the individuals entering the information in the records cannot be considered witnesses against the subject of the records . . . ." King, 146 P.3d 1274, ¶ 25.

Montana driving records share many similarities with the driving records discussed above, and this Court should join the majority of jurisdictions holding that driving records are not testimonial. Similar to these other jurisdictions, Montana statutes require the compilation of driving records: "the department shall create and maintain a central database of electronic files that includes an individual Montana driving record for each person." Mont. Code Ann. § 61-11-102(1). The entirety of Mont. Code Ann. § 61-11-102 establishes that the department's role in creating and maintaining driving records primarily involves ministerial and routine data entry tasks. For example, the statute sets forth what kind of information a driving record must contain, where to obtain the information, the manner in which to store records, and the length of time to retain the records. Mont. Code Ann. § 61-11-102.

This Court has long recognized that driving records fall within the "public records" hearsay exception. City of Billings v. Lindell, 236 Mont. 519, 521-22, 771 P.2d 134, 136 (1989). A review of the statutes shows that maintaining driving records involves administrative tasks and that the records are created and maintained independently of any pending criminal prosecution. In short, Montana driving records are a perfect example of "public records" that are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial--they are not testimonial." Melendez-Diaz, 129 S. Ct. at 2539-40.

Walter's case itself illustrates the independence of driving records from a criminal prosecution. The State introduced a portion of Walter's driving record, including the Order of Suspension, a letter which informed Walter of the suspended status of his license. (State's Ex. 2; Tr. at 115.) This suspension letter was sent to Walter in January 2009, five months before he was arrested for driving while suspended. (State's Ex. 2.) Thus, Walter's driving record existed and reflected the suspended status of his driver's license "*prior* to the events leading up to his criminal prosecution," and it would have continued to exist regardless of whether Walter had driven while suspended or if he had never been caught. Shipley, 757 N.W.2d at 237. The information in Walter's driving record had been entered months before he committed this offense, and accordingly, the motor

vehicle employees who entered the data cannot be considered "witnesses against him when no prosecution existed at the time of data entry." Shipley, 757 N.W.2d at 237; accord Davis, 156 P.3d at 96; accord King, 146 P.3d 1274, ¶ 25. Walter's driving records are not testimonial, and thus, admitting the records did not implicate his confrontation right.

C. Determining That Driving Records are Not Testimonial Comports With the United States Supreme Court's Melendez-Diaz Decision.

Determining that driving records are nontestimonial is consistent with the Melendez-Diaz holding because driving records bear little similarity to the forensic analysts' affidavits that the United States Supreme Court determined were testimonial. The nontestimonial nature of Walter's driving record is apparent when it is contrasted with the affidavits in Melendez-Diaz.

In Melendez-Diaz, the affidavits from the forensic analysts reflected the results of expert scientific testing and analysis; specifically, the affidavits identified an unknown substance as cocaine. Melendez-Diaz, 129 S. Ct. at 2531-32. The Supreme Court noted the wide variety of techniques and methodologies used by the scientific community and the Court observed that the scientific methodology employed in Melendez-Diaz "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." Melendez-Diaz, 129 S. Ct. at 2537.

The Supreme Court also found significant the purpose of the forensic scientists' affidavits, noting that "the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." Melendez-Diaz, 129 S. Ct. at 2532 (emphasis in original). Additionally, the Court noted the possible danger that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure--or have an incentive--to alter the evidence in a manner favorable to the prosecution." Melendez-Diaz, 129 S. Ct. at 2536.

Unlike the affidavits in Melendez-Diaz, the data entry necessary to maintain driving records requires no expert analysis, nor is there any need for an employee of the motor vehicle division to exercise discretion when performing the routine tasks. On the contrary, the statutes describe the records the department must keep, the procedures to follow, and the instances in which the information may be released. Mont. Code Ann. §§ 61-11-102, -105.

Moreover, the purpose of driving records is not to provide evidence against a defendant. Though driving records may be used in prosecutions, the purpose of creating and maintaining the records is not for prosecution, but for administrative documentation of the individuals who are authorized to drive in the State of Montana. Mont. Code Ann. § 61-11-102(1). In contrast to the affidavits in Melendez-Diaz, Walter's driving record was not "*create[d]* . . . for the sole

purpose of providing evidence against" him and it was not "prepared specifically" for use at Walter's trial. Melendez-Diaz, 129 S. Ct. at 2539-40 (emphasis in original).

Further, as discussed, the ministerial tasks associated with maintaining driving records take place independently of any criminal prosecutions. Consequently, the United States Supreme Court's concerns about the pressures that a law enforcement request might place on a forensic scientist in a drug prosecution simply are not implicated. Montana driving records are not analogous to the affidavits in Melendez-Diaz, and thus, they are not testimonial.[1]

The portion of Walter's driving record that was introduced at trial further supports that driving records are not the equivalent of an affidavit. The Supreme Court defines affidavit as a "declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths" and as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Melendez-Diaz, 129 S. Ct. at 2532 (internal quotation marks and citations

[1]Some courts have held that a "Certificate of Non-existence of record," (CNR) is testimonial. E.g., United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010). CNRs often are prepared in cases involving illegal immigrants to certify that a record search did not locate a particular record. The Martinez-Rios court noted that "CNR's are not routinely produced in the course of government business but instead are exclusively generated for use at trial. They are, therefore, testimonial." Martinez-Rios, 595 F.3d at 586. Whatever similarity CNRs may share with the affidavits in Melendez-Diaz, they are not analogous to the driving records at issue in Walter's case.

omitted). Here, the State introduced an Order of Suspension to verify that Walter's license had been suspended. (Tr. at 115.) Unlike an affidavit, the Order of Suspension is not a sworn declaration of facts or a "solemn declaration or affirmation." Rather, the Order of Suspension simply is a letter from the motor vehicle division to Walter. (State's Ex. 2.) There is no sworn, formal signature; rather, the letter is initialed by a clerk. Id.

Additionally, as this Court has observed, a statement's intended audience, purpose, and context are significant when determining whether a statement is testimonial. Sanchez, ¶ 34. Here, the suspension letter was addressed to Walter, not to law enforcement officials. (State's Ex. 2.) Further, the content of the letter establishes that its purpose was not to provide testimony against Walter, but to inform him that his license had been suspended, the reasons for the suspension, and where Walter could obtain more information about the suspension. Id. In addition to informing Walter that he was no longer authorized to drive, the letter described how Walter could regain his driving privileges. Id. It is also notable that the letter predates Walter's arrest for driving while suspended by five months. The timing and substance of the Order of Suspension establish that the letter is not testimonial. Accordingly, Walter's confrontation right was not implicated.

III. THIS COURT SHOULD REJECT WALTER'S ATTEMPT TO SUPPLEMENT THE RECORD ON APPEAL.

As a final matter, this Court should reject any attempt by Walter to supplement the record in his reply brief. Walter claims on appeal that he lacks a copy of the driving record introduced during trial and he speculates about the appearance of his driving record and what information it included. (Appellant's Br. at 13-14.) Walter states that he intends to attach copies of his driving record and other documents to his reply brief. (Appellant's Br. at 14-15, nn.1-2.) This Court should refuse any attempt to supplement the record.

Nothing in the record supports Walter's contention that the State introduced anything at trial other than the documents included as exhibits on appeal. The primary document in question is State's Exhibit 2, which the State introduced as a "self-authenticating certified copy or *portion of the copy* of Mr. Walter's driving record," which established that Walter's license was suspended. (Tr. at 115) (emphasis added). State's Exhibit 2 is a suspension letter and it is included in the record; a red exhibit sticker that contains the docket number and the trial date, 11/30/09, is affixed to the exhibit. See State's Ex. 2.

The transcript establishes that State's Exhibit 2 consisted of the suspension letter and nothing more. For example, the prosecutor referred to State's Exhibit 2 as a letter, and a witness read the first paragraph of State's Exhibit 2, which matches the first paragraph of the Order of Suspension. (Tr. at 133-34.)

Additionally, when discussing the numbering of other exhibits, the prosecutor stated, "Your Honor, I think that was already admitted. The suspension letter was admitted as Exhibit 2 I believe." (Tr. at 136.)

In addition to the suspension letter, the State introduced three other exhibits: a "failure to pay" notice (exhibit 4), a notice of imminent driver's license suspension (exhibit 5), and a suspension form (exhibit 6). (Tr. at 135-38.) In total, the State introduced four exhibits during Walter's trial. All of the exhibits are included on appeal in the district court file. Thus, any attempt by Walter to attach documents to his reply brief would constitute an impermissible attempt to supplement the record and should be rejected. State v. Frazier, 2001 MT 210, ¶ 9, 306 Mont. 358, 34 P.3d 96 ("parties on appeal are bound by the record and may not attempt to introduce extraneous information in briefs or appendices.")

CONCLUSION

This Court should decline to reach Walter's Confrontation Clause argument based on his failure to raise the issue in the district court. If this Court exercises plain error review, it should hold that Walter's driving records are not testimonial,

and thus, their admission did not implicate his Sixth Amendment right to confrontation. This Court should affirm the district court.

Respectfully submitted this ____ day of July, 2010.

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I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

_____

MATTHEW T. COCHENOUR